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No. 85-1282

IN THE

Supreme Court Of The United States

October Term 1985

IRVING EAR, NOSE, THROAT & ALLERGY CLINIC and HERBERT R. KASNETZ, M.D.,

Petitioners,

v.

GROUP HOSPITAL SERVICE, INC., GROUP LIFE & HEALTH INSURANCE COMPANY and GROUP MEDICAL & SURGICAL SERVICE COMPANY d/b/a BLUE CROSS AND BLUE SHIELD OF TEXAS,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF RESPONDENTS FOR DAMAGES PURSUANT TO SUPREME COURT RULE 49.2

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QUESTIONS PRESENTED

1. Whether the petition for writ of certiorari fails to comply with Supreme Court Rule 17.1 by failing to state any special and important reasons for review of this action by this Court?

2. Whether this Court should grant certiorari to decide the hypothetical issue of whether one of the three Respondent Blue Cross/Blue Shield companies had the legal capacity to combine or conspire with the other two, where the trial court found that they did not in fact conspire, and the Court of Appeals found it unnecessary to decide the legal capacity issue?

3. Whether this Court should review Petitioners' claims of *per se* price fixing and boycott, when Petitioners have already conceded in the Court of Appeals that they "failed to establish a per se violation," and the Court of Appeals also found that the trial court's rejection of such claims was "clearly correct"?

4. Whether this Court should grant certiorari to determine whether the courts below erred in concluding that Petitioners failed to demonstrate the requisite anticompetitive effect to establish a Sherman Act violation under the rule of reason?

5. Whether the petition for writ of certiorari is frivolous as defined by Supreme Court Rule 49.2 and, if so, whether damages should be awarded to Respondents?

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OPINIONS AND JUDGMENTS BELOW

The unanimous, unpublished opinion of the United States Court of Appeals for the Fifth Circuit is reported at 1985-2 Trade Cases (CCH) ¶ 66,849 (5th Cir. Oct. 31, 1985) and is reproduced in appendix A to the petition for writ of certiorari.[1] The final judgment of the United States District Court for the Northern District of Texas is reproduced in the supplemental appendix to the

petition for writ of certiorari. The district court's statement of its reasons for granting Defendants/Resondents' motion for directed verdict is reproduced in appendix A herein.

PERTINENT STATUTES AND RULES

Statutes

Sherman Antitrust Act, Section 1, 15 U.S.C. § 1

Texas Insurance code, article 20.13

Federal Rules of Civil Procedure

Fed. R. Civ. P. 52(a)

Supreme court rules

Sup. Ct. R. 17.1

Sup. Ct. R. 49.2

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[1]Pursuant to Fifth Circuit Local Rule 47.5, the court below determined that its opinion should not be published because it has no precedential value and merely decides this particular case on the basis of well-settled principles of law.

STATEMENT OF THE CASE

Respondents ("Blue Cross/Blue Shield") adopt the statement of facts contained in the opinion of the Court of Appeals. Petition, App. A. Following that opinion, Petitioners ("Kasnetz") timely filed the petition for writ of certiorari.

SUMMARY OF ARGUMENT

This is a frivolous appeal.

This case is inappropriate for review on writ of certiorari. No "special and important" reasons for granting review arise in this case, and none are stated in the petition. There is no conflict between the opinion of the Fifth Circuit in this case and the decisions of other circuits or of this Court. Both the district court and the Fifth Circuit applied the correct standards of judgment and review and neither court departed from the accepted and usual course of judicial proceedings in deciding this controversy. Kasnetz' petition merely seeks *de novo* review of the lower courts' findings that his factual evidence was insufficient to present a jury question.

Certiorari should not be granted to review the issue of whether one of the three Blue Cross/Blue Shield companies had the legal capacity to conspire with the other two. Petitioners fail to demonstrate or even argue that the trial court's factual finding—that no such combination or conspiracy was shown by the evidence—was clearly erroneous. Moreover, the Court of Appeals found it unnecessary to decide this legal issue because the alternate ground for dismissal of Petitioners' case is well grounded in established law.

There is absolutely no reason to grant certiorari so that this court can review Petitioners' claims of *per se* antitrust violation. Petitioners conceded in the Fifth Circuit that they "failed to establish a *per se* violation." Petition, p. A-5. There is simply no rea-

son why the Petitioners should be permitted to resurrect this claim in the Supreme Court. Their request for review of the *per se* issue is frivolous.

Petitioners' request for *de novo* review of the Fifth Circuit's conclusion that they "utterly failed" to present sufficient factual evidence of injury to competition in the relevant market is also frivolous. The only evidence relied upon by Petitioners in this regard was found to be woefully inadequate, and Petitioners fail to offer any valid reason to question that conclusion.

The petition is frivolous as it seeks merely a *de novo* review of facts and clearly correct conclusions of the courts below, and it contains no valid reasons for the granting of certiorari. Accordingly, the petition for certiorari should be denied and Blue Cross/Blue Shield should recover the expenses it incurred in responding to the petition.

ARGUMENT

1. THE PETITION FAILS TO SATISFY THE STANDARDS GOVERNING REVIEW ON CERTIORARI CONTAINED IN RULE 17.1 OF THE SUPREME COURT RULES.

This is not an appropriate case for review by this Court. Review on writ of certiorari is a matter of discretion, "and will be granted only when there are special and important reasons therefor." Sup. Ct. R. 17.1. The petition is frivolous because the issues it raises do not even arguably meet the standards set forth in Supreme Court Rule 17.

Rule 17.1(a) indicates that certiorari may be granted "[w]hen a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals." The trial judge's refusal to find the facts as Petitioners would have found them does not mean that the opinion in this case is in conflict with decisions

of other circuits. Although Petitioners seem to allege the proof of certain facts, their argument merely goes to the weight of the evidence.

Rule 17.1(a) also indicates review may be granted where a federal court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." The district court did not depart from accepted judicial proceedings by granting Blue Cross/Blue Shield's motion for a directed verdict. The Fifth Circuit did not sanction any such departure because there never was one. Rather, the Fifth Circuit's application of the familiar directed verdict standard on appeal, pursuant to *Boeing Company v. Shipman,* 411 F.2d 365, 374 (5th Cir. 1969) (en banc), was entirely in accordance with the accepted and usual course of judicial proceedings.

Petitioners were given a full and fair opportunity to present all their evidence against Blue Cross/Blue Shield at trial and to have such evidence reviewed by the Court of Appeals. The trial court's finding that Petitioners' evidence was insufficient to present a jury question on their claims, and the Fifth Circuit's unequivocal agreement with that conclusion, do not constitute any departure from normal judicial procedure.

Finally, the dismissal of the claims against Blue Cross/Blue Shield because of insufficient evidence did not decide "an important [unsettled] question of federal law," or create a "conflict with applicable decisions of this court." Sup. Ct. R. 17.1(c). In fact, the trial court's ground of dismissal relied upon by the Fifth Circuit "is solidly grounded in established law." *Irving Ear Nose, Throat & Allergy Clinic v. Group Hospital Service Co.,* 1985-2 Trade Cases (CCH) at 64,217. [Petition, p. A-5]. The ruling of the lower courts in the present case does not conflict with any applicable decisions of this Court. In fact, it is compelled by such decisions.

Far from making the requisite showing that there are "special and important reasons" why review should be granted in this case, Petitioners have failed to show any reasons why this case should be heard by the Supreme Court. Therefore, certiorari should be denied.

2. THERE IS NO REASON FOR THIS COURT TO DECIDE WHETHER THE BLUE CROSS/BLUE SHIELD COMPANIES HAD THE LEGAL CAPACITY TO COMBINE OR CONSPIRE UNDER § 1 OF THE SHERMAN ACT, WHERE THE TRIAL COURT FOUND THAT THEY DID NOT, IN FACT, COMBINE OR CONSPIRE, AND THE COURT OF APPEALS FOUND IT UNNECESSARY TO DECIDE THE LEGAL ISSUE.

Petitioners first urge this Court to decide whether the Blue Cross/Blue Shield companies had the capacity to combine or conspire under § 1 of the Sherman Act. Petition, p. 6. The trial court concluded that the Blue Cross/Blue Shield companies "did not, in fact, combine or conspire to violate § 1 of the Sherman Act." Petition, p. 5. Petitioners now improperly seek review of this factual finding. On review, the factual decisions of the trial court are subject to revision only where "clearly erroneous." *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-395 (1948); Fed. R. Civ. P. 52(a). Petitioners have failed to address this standard, much less demonstrate that the trial court's factual determination in this regard was "clearly erroneous."

The Court of Appeals found it unnecessary to decide the question of GMSS' ability to conspire with the other two Blue Cross/Blue Shield companies because the alternate ground for the district court's ruling "is solidly grounded in established law." *Irving Ear, Nose, Throat & Allergy Clinic v. Group Hospital Service, Inc.*, 1985-2 Trade Cases (CCH) at p. 64,217 (5th Cir. Oct. 31, 1985) [Petition, p. A-5]. Under these circumstances,

there is no reason for this Court to decide this issue in the highly fact-specific case at hand.

Finally, Petitioners' argument on the issue of ability to conspire is premised on a purely hypothetical situation. The lower courts' conclusion that GHS and its wholly owned subsidiary, GLH, are legally incapable of conspiring with each other was undisputedly correct. *Copperweld Corp. v. Independence Tube Corp.*, ____ U.S. ____, 104 S.Ct. 2731, 2745 (1984). The only related question posed by the petition is whether GMSS was capable of conspiring with the other two Blue Cross/Blue Shield entities, GHS and GLH. Petition, p. 6. It is undisputed that GMSS does not actually compete with either GHS or GLH. Notwithstanding this simple, dispositive fact, Kasnetz contends that GMSS' "potential ability to compete" with the other Blue Cross/Blue Shield companies is controlling on the issue of capacity to conspire. Petition, p. 8. Kasnetz cites no legal authority in support of this bald assertion. This is not surprising since horizontal combinations in restraint of trade are agreements among actual competitors. *E.g., Plueckhahn v. Farmers Insurance Exchange,* 749 F.2d 241, 245 (5th Cir.), *cert. denied,* 105 S.Ct. 3527 (1985). Cases should be decided on the basis of the evidence as to what actually happened, not what could have happened. There is no reason why the question of "potential ability to conspire" should even be addressed by this Court.

3. THERE IS NO REASON TO REVIEW PETITIONERS' CLAIM OF PER SE VIOLATION.

A. PETITIONERS HAVE CONCEDED THAT THEY FAILED TO ESTABLISH A PER SE VIOLATION.

Even assuming, *arguendo,* that the Blue Cross/Blue Shield companies had the legal capacity to combine or conspire and somehow in fact formed a combination or conspiracy, the alleged restraint in issue does not constitute an antitrust violation.

In their petition, Petitioners contend that they proved a *per se* violation of § 1 of the Sherman Act. Petition, p. 10. But the court of Appeals stated: "At oral argument, Kasnetz conceded that he had failed to establish a per se violation." *Irving Ear, Nose, Throat & Allergy Clinic v. Group Hospital Service, Inc.*, 1985-2 Trade Cases (CCH) at p. 64,217 [Petition, p. A-5]. Having conceded this issue in the court below, Petitioners should not now be permitted to resurrect it in this Court.

B. THE DISTRICT COURT'S DECISION TO DIRECT A VERDICT ON THE ALLEGED PER SE VIOLATIONS IS CLEARLY CORRECT ON THE UNDISPUTED FACTS PRESENTED IN THIS CASE.

Even if the "merits" of Petitioners' *per se* argument should be considered herein, such argument is utterly frivolous. The Court of Appeals held: "The district court's decision to direct a verdict on the alleged per se violations is clearly correct on the undisputed facts presented in this case." *Irving Ear, Nose, Throat & Allergy Clinic v. Group Hospital Service, Inc.*, 1985-2 Trade Cases (CCH) at p. 64,217 n.3 [Petition, p. A-5]. The undisputed facts are that the three Blue Cross/Blue Shield companies did not compete with each other, or hold themselves out as competitors. Kasnetz, a physician, did not sell health insurance, so Kasnetz did not compete with any of the Blue Cross/Blue Shield companies. *Id.* Thus, "no evidence of horizontal price fixing or illegal boycott was adduced." *Id.* (citing *Plueckhahn v. Farmer's Insurance Exchange*, 749 F.2d 241 at 245; and *Blackburn v. Crum & Forster*, 611 F.2d 102, 104 (5th Cir.), *cert. denied*, 447 U.S. 906 (1980)).

Petitioners' reliance on *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982) is misplaced. In *Maricopa*, the Court invalidated a horizontal agreement among competing physicians concerning their maximum charges in a prepaid health care plan organized and controlled by them. The *per se* unlawful

horizontal price fixing at issue in *Maricopa* is far different from the alleged vertical relationship here.[2] In fact, *Maricopa* notes that health insurers may lawfully establish their maximum reimbursable rates.

> This program and the Blue Shield plan challenged in *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979) indicate that insurers are capable . . . of fixing maximum reimbursable prices . . . . [N]othing in the record even arguably supports the conclusion that this type of insurance program could not function if the fee schedules were set in a different way [than by horizontal agreement among providers].

457 U.S. at 353.

Petitioners' reliance on *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) is also misplaced. In *Virginia Academy*, private physicians controlled a majority of the board of directors of the Blue Shield in Virginia, in accordance with that Blue Shield plan's by-laws. *Id.*, 624 F.2d at 479-481. In the instant case, there is no such private physician control. Rather, the board of directors of GHS is composed of twenty directors, of whom no more than three may be private physicians and one a dentist. Texas Insurance Code Annotated Article 20.13 (Vernon 1981). Appendix B. The boards of directors of GLH and GMSS are similarly composed. Petition, p. A-2. Private physicians simply do not control Blue Cross/Blue Shield of Texas. Petitioners' argument that some employees of Blue Cross/Blue Shield are also licensed physicians misses the point that the board of directors has the ultimate responsibility for Blue Cross/Blue

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[2]Several recent health care opinions similar to the present case have expressly held that *Maricopa* is simply not on point. E.g., *Kartell v. Blue Shield of Massachusetts, Inc.*, 749 F.2d 922, 930 (1st Cir. 1984), *cert. denied*, 105 S.Ct. 2040 (1985); *Royal Drug Co. v. Group Life & Health Insurance Co.*, 737 F.2d 1433, 1437 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 912 (1985).

Shield's business decisions, and only a small minority of such board members are physicians. The horizontal aspect of the *Virginia Academy* case is absent in the present case. Thus, Petitioners' claim or *per se* horizontal price fixing is clearly without merit.

Moreover, as the court below correctly noted, Petitioners sold no products, goods or services supplied to them by Blue Cross/Blue Shield, so there is no resale transaction involved at all; thus, a *per se* vertical price fixing (resale price maintenance) theory is clearly inappropriate. Petition, p. A-5 n.3 (citing *Royal Drug Co. v. Group Life & Health Insurance Co.*, 737 F.2d 1433, 1438 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 912 (1985)). In sum, there is no plausible basis for Petitioners' previously abandoned claim of *per se* price fixing, whether it be horizontal or vertical; it need not be reviewed by this Court.

Petitioners also contend that this case presents "a classic group boycott," Petition, p.12, which warrants *per se* condemnation. It does not. When, as in this case, a boycott allegation "does not present the classic case of a boycott in which a group of business competitors seeks to benefit economically by excluding other competitors from the market place," *per se* analysis does not apply. *Plueckhahn v. Farmers Insurance Exchange*, 749 F.2d at 246.

This Court has recently cautioned against unwarranted application of the *per se* rule in group boycott cases which do not involve efforts to disadvantage competitors or the likelihood of predominantly anticompetitive effects. *Northwest Wholesale Stationers, Inc. v. Pacific Stationary and Printing Co.*, ___U.S. ___, 105 S.Ct. 2613, 2619-20 (1985) (rule of reason applied to group boycott claim). Because none of the parties in this case is a competitor with any of the others, there is no horizontal aspect to their relationship. No effort to disadvantage any competing insurer is even suggested. And there are no predominantly anti-

competitive effects involved. Accordingly, the *per se* rule clearly is not applicable to the group boycott claim. *Id.; Plueckhahn,* 749 F.2d at 245; *Royal Drug Co. v. Group Life & Health Insurance Co.,* 737 F.2d 1433, 1436-1439 (5th Cir. 1984), *cert. denied,* 105 S.Ct. 912 (1985) ($2 cap on balance billing by pharmacies were "novel restraints with potential procompetitive effects"); *Kartell v. Blue Shield of Massachusetts, Inc.,* 749 F.2d 923 (1st Cir. 1984), *cert. denied,* 105 S.Ct. 2040 (1985).

4. THE COURTS BELOW CORRECTLY HELD THAT PETITIONERS FAILED TO ESTABLISH THE REQUISITE ANTICOMPETITIVE EFFECT UNDER THE RULE OF REASON.

The Court of Appeals correctly held that Petitioners had "utterly failed to present proof from which a reasonable person could infer an unreasonable restraint of trade," because the requisite anticompetitive effect was not demonstrated. Petition, p. A-6. Petitioners now contend that the testimony of one of their witnesses, Dr. Wade Clifton, an economist, demonstrated injury to competition in the geographic market area and among physicians of Dr. Kasnetz' specialty. Petition, p. 9. & n. 5. [Tr. 767-768]. But the trial testimony of Dr. Clifton falls far short of proving the requisite injury to competition. In truth, a review of the testimony of Dr. Clifton reflects the candid admission that he had never done a study of the effect of Blue Cross activities on other doctors' practices. Tr. 831.

The actual evidence on this point showed merely that two doctors in the adjoining city of Dallas, one of whom was an ear, nose and throat specialist, were placed on prepayment review status by Blue Cross/Blue Shield during 1982. Tr. 180-185; 829-831. Even if it is conceded that both of them were competitors of Dr. Kasnetz in the relevant geographic and product markets, the mere fact that two such doctors were also under review for possibly excessive billing or performing unnecessary treatment hardly

demonstrates the requisite "injury to competition." Petitioners did not establish how many such competitors existed in the relevant market, nor the effect on other physicians' practices as a result of Blue Cross/Blue Shield's actions. Blue Cross/Blue Shield does business with virtually all of the 24,000 physicians in Texas. Tr. 828-829. Only about 150 of them were even on prepayment review status at the time of trial. Tr. 828.

Both of the courts below correctly applied the usual *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) standard and both emphatically concluded that Petitioners failed to present sufficient evidence to go to a jury on which a finding could be based that Blue Cross/Blue Shield's actions resulted in the requisite injury to competition. (Appendix A, pp. A-4–A-5; Petition, p. A-6).

Petitioners now simply seek to rehash this same issue for the third time in the Supreme Court. Under these circumstances, the petition for certiorari can only be described as frivolous, and review should be denied.

BLUE CROSS/BLUE SHIELD'S MOTION FOR DAMAGES PURSUANT TO SUPREME COURT RULE 49.2

5. THE PETITION FOR CERTIORARI IS FRIVOLOUS AND BLUE CROSS/BLUE SHIELD SHOULD BE AWARDED DAMAGES PURSUANT TO SUPREME COURT RULE 49.2.

Supreme Court Rule 49.2 provides:

> When an appeal or petition for a writ of certiorari is frivolous, the court may award the appellee or the respondent appropriate damages.

This rule should be invoked in this case because Petitioners' petition is frivolous in that it does not even arguably present an appropriate case for review by this court under Supreme Court Rule

17.1. It seeks *de novo* review of the trial court's factual findings by concocting frivolous legal issues claimed to be appropriate for Supreme Court review. Petitioners carelessly misstate applicable precedent. The holdings of the courts below are clearly grounded in established law. In sum, the filing of the petition in this case is an abuse of this Court's general policy of open access to litigants.

Attorneys have long been on notice, pursuant to the Supreme Court Rules, that frivolous petitions might result in an award of damages to the opposing party. This case provides the Court with the opportunity to discourage patently meritless applications and thereby minimize the time devoted by the Court to the disposition of such applications, which is the purpose of Rule 49.2. Lawyers have not only the right, but a duty, to decline to press a frivolous case which would impose unnecessary burdens on the courts while legitimate claims wait to be determined. Supreme Court Rule 49.2 is a prudent measure by which to curb the increasing flow of meritless appeals to this Court through attorney self-regulation. To this end, Blue Cross/Blue Shield respectfully submits that this Court should apply Rule 49.2 in this case.

This Court recently discussed the standards for application of Rule 49.2. In *Talamini v. Allstate Insurance Company*, ___ U.S. ___, 105 S.Ct. 1824 (1985), Chief Justice Burger, joined by Justices Rehnquist and O'Connor, stated: "Rule 49.2 has a purpose which has too long been ignored; it is time we applied it." 105 S.Ct. at 1825. While it is true that Rule 49.2 and its predecessors have rarely been invoked, *id.*, 105 S.Ct. at 1827 n.7, that is no reason to continue the same policy. Indeed, the reverse is true. Experience shows that the old policy has failed to stem the present flood of meritless litigation. Blue Cross/Blue Shield respectfully submits that this action is worthy of application of the sanctions provided by Rule 49.2.

For the foregoing reasons, Blue Cross/Blue Shield respectfully requests that the Court award reasonable expenses, including attorney's fees, incurred by Blue Cross/Blue Shield as a result of Petitioners' frivolous petition for certiorari.

CONCLUSION

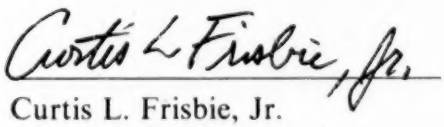
The petition for writ of certiorari should be denied.

Damages should be awarded to Blue Cross/Blue Shield pursuant to Supreme Court Rule 49.2.

Dated this 28th day of February, 1986.

Respectfully submitted,

GARDERE & WYNNE

By: 
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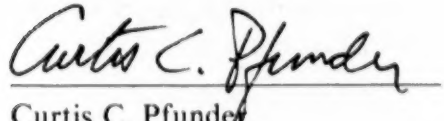
By: 
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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

IRVING, EAR, NOSE, THROAT & ALLERGY CLINIC and HERBERT R. KASNETZ, M.D.,

Plaintiffs,

v.

GROUP HOSPITAL SERVICE, INC., GROUP LIFE & HEALTH INSURANCE CO., GROUP MEDICAL AND SURGICAL INSURANCE COMPANY, d/b/a BLUE CROSS OF TEXAS AND BLUE SHIELD OF TEXAS,

Defendants.

Docket No.
CA3-81-1786-H

Dallas, Texas
April 6, 1984
2:00 O'Clock, P.M.

VOLUME VI
TRANSCRIPT OF PROCEEDINGS COURT'S RULING ON MOTION FOR INSTRUCTED VERDICT BEFORE THE HONORABLE BAREFOOT SANDERS

THE COURT: As counsel are well aware, after I recessed the jury for lunch I heard argument on Defendants' Motion for a Directed Verdict. It is a matter not so much as the Motion itself but th law of the case which has been concerning me for quite some time. I have decided to grant the Motion and I will spell out at this time fairly briefly the reasons for doing it.

As I view it, this is a case about a health insurance company, Blue Cross and Blue Shield, which has refused to pay Plaintiffs

for claims for medical services which it deems unnecessary and claims for medical services which it deems not usual, customary and reasonable and that is the lawsuit. Only one insurance company is involved. No other insurance company, no competitor of Blue Cross-Blue Shield is involved. Plaintiff is not insured by the Defendants although some of his patients quite obviously are.

The first essential element of a claim for relief under Section 1 of the Sherman Act is that there be a "contract combination of conspiracy as set forth in 15 U.S.C.A. Section 1. Common ownership does not by itself preclude Sherman Act Section 1 liability for possible conspiracy or combinations between affiliated corporations or parents and subsidiary corporations."

Between Mr. Henry and myself we tried to read a good many cases this week. I will cite a few.

Perma life Mufflers, Inc. v. International Parts Corporation, 392 U.S. 134 at 131, 142, a 1968 Supreme Court case.

Kiefer-Stewart Co. v. Seagram, 340 U.S. 211 at 215, rehearing denied 340 U.S. 1939, 1951.

Gibbons, Inc. v. Crawford Fitting, 704 F.2d 787 at 795, a 1983 Fifth Circuit case.

H & B Equipment Company, Inc. v. International Harvester, 577 F.2d 239 at 244.

Further, separate ownership or separate incorporation that is to say is not dispositive. The court must examine the substance of corporate relationship rather than its form. In addition to that and I quote "An important element in this capacity to conspire has been that the separate corporations be in the position of competitors" citing *Gibbons v. Crawford Fitting* which I mentioned a moment ago, this time at 795 and H & B Equipment Company I cited a moment ago at page 244.

In this case the three Defendants, Group Hospital, Group Life & Health and Group Medical are all under the same egis. Their

Boards of Directors are virtually identical. The Boards of all three meet in a simultaneous meeting, tha. is all together. The companies act as a single entity. The individual corporate form of each Defendant is purely a matter of form and is of no substantive effect or importance for purposes of this case or the antitrust laws.

Furthermore, the three companies have not been shown to be in any way competitors or in competing positions. Group Hospital is a non-profit corporation which sells hospitalization and medical and surgical insurance while Group Life sells life and disability and Group Medical and Surgical has not been active as a business entity since 1976. All three are licensed under the trade name Blue Cross and/or Blue Shield. All employees as best I could discern from the evidence apparently perform functions for all three companies. Indeed, the Defendant companies are so intertwined and indistinguishable that Defendants' employees are often not certain which company they are working for since the employees are interchanged between the companies constantly and as I say indistinguishable. The three companies as I say act as one. They do not compete and in fact and in law for antitrust purposes they are one and the same entity.

So I find and conclude that the Defendants do not have the capacity to combine or conspire nor indeed did they combine or conspire as a matter of law. The first element of the Sherman Act not being met the Motion should be granted on that ground alone.

Several grounds are presented to me. I will take it one step further.

Even if the Defendants had the capacity to combine or conspire I find that the Plaintiffs have failed to present legally sufficient evidence of price fixing, refusal to deal or secondary boycott and therefore they could not go to the jury on that element. I will discuss that in a little bit of detail.

The Plaintiffs contend that the Defendants' conduct constituted a per se horizontal refusal to deal and a per se horizontal second-

ary boycott, both violations of Section 1. There is quite obviously no evidence that the Plaintiffs are competitors with the Defendants. There is no evidence of any form of horizontal competition between the parties. As the Fifth Circuit has stated scope is properly given to the per se doctrine "in cases in which the plaintiff the excluded party is on the same competitive level with one member of the conspiracy. In other words, in such cases it may be proper to infer anticompetitive motive and effect because a conspiracy has a horizontal aspect."

That was a case out of the Northern District of Texas, *Blackburn v. Crum & Forster,* 611 F.2d 102 at 104, Fifth Circuit 1980. However, the Circuit went on to hold in Blackburn that where the defendants are not competitors with the plaintiffs and the case contains no horizonal aspects, the per se rule is inapplicable. See Blackburn at page 104. This holding was also applied in a similar situation in *McQuade Tours v. Consolidated Air Tour Manual Committee,* 467 F.2d 178 at 185-187, a 1972 Fifth Circuit case, cert. denied 409 U.S. 1109, 1973.

Just as in Blackburn and McQuade I find that there is no evidence of a horizontally competitive situation or relationship between Plaintiffs and Defendants. Absent horizontal aspect the Court must apply the rule of reason analysis to Plaintiffs' refusal to deal and secondary boycott allegations. See *Continental T.V. v. GTE Sylvania,* 433 U.S. 36 at 58, 1977 and also see Blackburn and McQuade that I have cited.

Now, the Plaintiffs also contend that Defendants' actions constitute a per se price fixing violation of Section 1. To reiterate, the evidence is lacking. In fact, I would say the record is devoid of any indication of any horizontal price restraints imposed on Plaintiffs by Defendants. Thus any price fixing allegations must satisfy standards for vertical price restraints to achieve a per se treatment. The Court is unable to find, and I have looked for it, any statement of law and I find nothing directly in point in what has been produced by the Plaintiffs any statement that would constitute an application of vertical price restraint rules, the type of conduct in issue here. While the Court recognizes that the experi-

ence of other courts with price restraints often results in language talking about *per se* and in *per se* considerations because of the pernicious nature of many price restraints, nonetheless this case does not present the vertical or horizonal aspects or anticompetitive effect to justify per se treatment. In that regard counsel are aware of and the Court has consulted *Arizona v. Maricopa County Medical Association,* 102 Supreme Court 2466, 1982 which was a per se price fixing analysis applied by the court and I have been interested in the discussion there.

So Plaintiffs' Section 1 claims must be considered in light of the rule of reason. However, in cases where the rule of reason analysis is applied to Section 1 claim the Plaintiffs must present evidence that the Defendants' conduct has had an adverse effect upon competition itself, not merely upon the Plaintiffs' business and as counsel are aware, there are numerous authorities on that, noteably *Brunswick Corporation v. Pueblo,* 429 U.S. 477 at 489, a 1977 case.

Alameda Mall, Inc. v. Houston Lighting and Power, 615 F.2d 343 at 353, Fifth Circuit, cert. denied 449 U.S. 870, 1980.

The Court finds that while the Plaintiff has presented evidence on the issue of their own injury, they have failed to present evidence sufficient to go to a jury on which a finding could be based that Defendants' acts have had an anticompetitive effect, that competition has in any way been injured or that anticompetitive acts have been made possible by Defendants' alleged violations. And counsel may consult the Brunswick case and also Blackburn and McQuade.

Accordingly I am of the view that there is no jury issue under the rule of reason as to anticompetitive effect.

So on these two grounds separately and cumulatively the Motion is granted. I do not reach the merits of the other grounds for the Motion although they may indeed have merit and I will enter a judgment of dismissal with prejudice.

Now, I want to say just this. You may have a complaint, Doctor. I don't know that. I don't think you have a Federal antitrust case quite obviously. I think you have been superbly represented in this lawsuit.

This Court will be in recess.

APPENDIX B

STATUTES AND RULES RELEVANT TO BRIEF IN OPPOSITION AND MOTION FOR DAMAGES

SHERMAN ANTITRUST ACT, §1, 15 U.S.C. §1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishements, in the discretion of the Court.

TEXAS INSURANCE CODE ARTICLE 20.13:

Art. 20.13: Personnel of Directors

Such corporation shall have 20 directors who shall have full control over its management affairs. The board of directors shall be composed of persons who are residents of Texas. Not more than five directors may be persons who are chief executive officers or owners of an institutional health care provider. Not more than three directors may be persons licensed by the Texas State Board of Medical Examiners. Not more than one director may be a person licensed by the Texas State Board of Dental Examiners. The remaining directors shall not be health care providers or employees of or have a financial interest in a health care provider as defined in this chapter.

FEDERAL RULE OF CIVIL PROCEDURE 52(a):

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgments shall be

entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of this action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

SUPREME COURT RULE 17.1:

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

SUPREME COURT RULE 49.2:

When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages.

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court, hereby certifies that three true and correct copies of the above and foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Motion of Respondents for Damages Pursuant to Supreme Court Rule 49.2 have been forwarded by certified mail, return receipt requested, to Tom Thomas, Kolodey, Thomas & Yeager, 1111 Two Turtle Creek Village, Dallas, Texas 75219, on this 28th day of February, 1986.

Curtis L. Frisbie, Jr.

Curtis L. Frisbie, Jr.